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To: Kalama City Clerk/Treasurer Coni McMaster (Via E-mail
cityclerk@kalama.com)

and; Kalama City Council

From: Kalama City resident Katharine Carmichel, of 311 Juniper Street, via her
counsel,
Stephen I. Liss, WSBA#44611

Re: An appeal asking Council to determine if city resident Katharine Carmichel
properly appealed a final decision of an administrative determination that a
bakery should be allowed to operate in an R-1 zoned neighborhood.

Date: September 28, 2015

To Ms. McMaster and the members of Kalama City Council:

Pursuant to your local code 17.12.050, City resident Katharine Carmichel is timely appealing the city's administrative decision to bar her from appealing an unsupported zoning ruling by city attorney Paul Brochvogel. Ms. Carmichel timely submitted an appeal to this council of her zoning complaint to Ms. McMaster on September 14, 2015. On September 27, city attorney Paul Brochvogel responded by e-mail that an appeal to this council would not be allowed allegedly because her appeal was allegedly untimely. Such an erroneous decision is on par with the city administrators' prior determinations in this matter and should be reviewed by the elected representatives of this city to prevent unnecessary expenditures of the taxpayers' dollars if this issue moves forward. Ms. Carmichel is requesting this council determine that she properly appealed the city's zoning ruling which wasn't made final until September 4 and appealed on September 14.

Here is an overall procedural history for your review:

On Sunday September 27, 2015, Kalama City Attorney e-mailed the following:

Dear Mr. Liss:

I write to inform you that your request for an appeal of staff's zoning interpretation under the Kalama Municipal Code is denied as the appeal was not timely made; and, therefore the City Council has no jurisdiction to hear the matter.

On August 10, 2015 you filed document making allegations concerning your client's neighbor; that the use of his property was in violation of the zoning laws.

On August 18, 2015 you were notified in writing that the City opined there was no violation of the zoning code.

You then called me and asked for the reasons why the city had not found in your client's favor; and, I asked for more particularity to your complaint so that I could respond. You filed a written document in this regard on September 1, 2015, to which I responded on September 4, 2015.

You then contacted the City Clerk and made a written request for an appeal on September 14, 2015.

As you point out, the City code requires a written appeal within ten (10) days of the City's decision. The City's decision was made on August 18, 2015 and your written appeal to the City Council was made on September 14, 2015. Your client's opportunity to appeal the City's decision ran on August 28, 2015. Accordingly, the City Council has no authority to hear your matter.

Sincerely,

Paul Brachvogel

END

In response to Mr. Brachvogel's letter, Ms. Carmichel points out that a final decision by the city was not made until September 4, 2015. It was at that time that Mr. Brachvogel cited some facts and law in which he relied upon to deny Ms. Carmichel's complaint. Until then, and especially prior to Ms. Carmichel's first denial, he conceded, no investigation was performed to determine if the bakery was operating illegally.

In a phone call to his office, which he alludes to in his letter, he requested and received more information to reconsider his decision, including: information from state regulators; citations to city and state laws; and Ms. Carmichel's statements which wholly contradicted the attorney for the bakery's assertions that the bakery was operating during normal business hours and with minimal impact to surrounding properties.

The original complaint to the city was filed on August 10, 2015 where Kalama City resident Ms. Carmichel outlined her issues with the zoning violations. In part, the letter stated that her neighbors Victor and Edith Ahrens, of 597 North Third Place, Kalama (Cowlitz County tax parcel number 40533), were operating an illegal bakery out of their home in violation of Kalama Muni Code 17.60.020.

On August 19, 2015 Kalama City Attorney Paul Brachvogel offered a written opinion, without citing any facts or law, which indicated he believed the Ahrens were operating within the limits of the city's zoning ordinances and applicable city and state laws.

On September 1, per **his** request to more thoroughly review this matter, a more detailed complaint was provided to Mr. Brachvogel. This time pointing out that even if the Ahrens' business was considered a cottage industry, as he suggested, the local zoning laws specifically forbid operating a "bakery" in an R-1

zoned neighborhood. Muni Code 17.60.020. Nevertheless, in his September 4, 2015 e-mail (provided below in its entirety) Mr. Brachvogel denied Ms. Carmichel's request to close the bakery in her residential neighborhood, believing instead that the heavy early morning truck and employee traffic from the bakery business does not alter "the residential character of the neighborhood" nor does it objectively create a "negative impact on the general welfare of adjacent property owners."

On September 14, 2015, exactly 10 days after his final determination was made, Ms. Carmichel appealed this decision and asked council to review the matter. He clearly states that he was reconsidering the matter (as opposed to just filing an appeal with city council) when he wrote in the very first sentence of his Sept. 4th response:

"My client has reviewed your request to reconsider your client's allegation that Mr. Ahrens is operating a bakery in violation of R-1 permitted uses, but concludes the Ahrens are operating lawfully within the code."

It seems disingenuous now to deny Ms. Carmichel's appeal based on Mr. Brachvogel's interpretation of when he offered a final decision. He somehow asserts that the issue was ripe for an appeal after his first written response. However, if he intended his first e-mail to act as a final determination he wouldn't have: 1) asked for more facts and law; 2) obtained factual statements from the bakery's attorney; and 3) offered a subsequent ruling which admits he was actively reconsidering his prior ruling. Instead, he would have indicated that his first response was a final ruling, of which an appeal to council would be proper. As an attorney, Mr. Brachvogel knows that appeals must be ripe before another governing body intervenes. An appeal to this council did not become ripe until his September 4 decision was rendered.

Furthermore, Mr. Brachvogel's decision to deny Ms. Carmichel an opportunity to be heard by Kalama's elected officials seems odd as it would cost tax payers nothing to hear an appeal during a regularly scheduled council meeting

and ultimately save thousands in legal fees to avoid a suit that appears legitimate by any reading of your local statutes. This is among the many reasons why this council should determine that Ms. Carmichel's appeal is timely – it allows an elected body of officials to avoid having to defend a suit in court because of an erroneous decision by a city employee.

A full spectrum of interactions with the city administrator's office including the September 1, 2015 letter to Mr. Brachvogel (with attachments via e-mail):

To: Paul Brachvogel, Kalama City Attorney

Date: September 1, 2015

VIA E-MAIL (brachvogel1@msn.com)

RE: Commercial Bakery Operating in an R-1 Zoned Neighborhood; Code Violation

Dear Mr. Brachvogel,

This is a follow-up to our previous letters and e-mails to the city regarding the bakery operating at 597 North Third Place, Kalama (Cowlitz County tax parcel number 40533) owned by Victor and Edith Ahrens. As you know, I represent Katharine Carmichel, of 331 Juniper Street, Kalama. She is the Ahrens' neighbor and has been tortured by the constant employee and truck traffic flowing in and out of this home in her residential single-family home neighborhood. (See Zoning Map scanned and attached to this e-mail). It is unequivocally clear both properties are zoned in an R-1 neighborhood.

In 2011, the Ahrens started a bakery out of their home. (See "Bread Winner: Kalama boy starts sourdough bakery business" scanned and attached to e-mail). Back then, they produced 130 loaves a day by their own admission. Since then, it's grown exponentially and as of right now, the Ahrens consider themselves a commercial bakery enterprise. (See Ahrens Washington State business license at

<http://dor.wa.gov/content/doingbusiness/registermybusiness/brd/default.aspx>;
type in Kalama Sourdough Bakery); and
<https://www.facebook.com/KalamaSourdoughBakery>.

While it may be legal in Washington State to run a business from a home kitchen under its revised 2012 cottage industry law; in Kalama it's illegal to run a bakery in an R-1 zoned neighborhood. Bakeries and food processors are specifically prohibited with or without a permit. See Kalama Muni Code 17.60.020 at (https://www.municode.com/library/wa/kalama/codes/code_of_ordinances?nodeId=TIT17ZO_CH17.60USTA).

Similarly, the cottage industry law in Washington State, which allows residents to operate small businesses out of their homes, has a prohibited list of products. The Ahrens' bakery is certainly much larger now than a "cottage industry" but if it were considered one (which it is not) the list of prohibited products produced on site would include several of the items the Ahrens use in their products including eggs, cheese and other dairy products. Here is that list:

[Prohibited Products \(WAC 16-149-130\)](#) This is not all inclusive but provides most of the types of prohibited cottage food products.

- This section lists unacceptable cottage food products. Although not inclusive, it lists most types of unapproved cottage food products:
 - Fresh or dried meat or meat products including jerky;
 - Fresh or dried poultry or poultry products;
 - Canned fruits, vegetables, vegetable butters, salsas, etc.;
 - Fish or shellfish products;
 - Canned pickled products such as corn relish, pickles, sauerkraut;
 - Raw seed sprouts;
 - Bakery goods which require any type of refrigeration such as cream, custard or meringue pies and cakes or pastries with cream or cream

- cheese fillings, fresh fruit fillings or garnishes, glazes or frostings with low sugar content, cream, or **uncooked eggs**;
- Tempered or molded chocolate or chocolate type products;
 - **Milk and dairy products including hard, soft and cottage cheeses and yogurt**;
 - Cut fresh fruits or vegetables;
 - Food products made from cut fresh fruits or vegetables;
 - Food products made with cooked vegetable products;
 - **Garlic in oil mixtures**;
 - Juices made from fresh fruits or vegetables;
 - Ice or ice products;
 - Barbeque sauces, ketchups, or mustards;
 - **Focaccia-style breads with vegetables or cheeses.**

These types of activities are reserved for non-residential zoned areas as described in your Kalama Code 17.08.199 - Light industrial manufacturing for up to forty thousand square feet of gross floor area.

In its entirety:

“Light industrial manufacturing up to forty thousand square feet of gross floor area” means those industrial or manufacturing activities which are engaged in the production of articles or a product from raw or prepared materials by giving them new forms and qualities and may include, but are not limited to, processing, packaging or treatment of bakery goods, candy, pharmaceuticals, perfume, toiletries, soft drinks and food products and consumer goods, timber, wood and paper products, chemical products, medical and optical products, feed, metal and metal alloy products and the storage of raw materials for such industries. Gross floor area shall not exceed forty thousand square feet.”

(Ord. No. 1313, § 1, 6-5-2013)

In 2014, the Kalama Sourdough Bakery grew large enough that it was no longer a kid’s home project,

<https://www.facebook.com/KalamaSourdoughBakery/posts/672967879439195>)

but a full-fledged commercial bakery business operating out of Ms. Carmichel's residential neighborhood – complete with 24-hour-a-day employees and delivery trucks.

Originally within its jurisdiction, administrators for the state's cottage industry department contend this business is no longer within its agency's oversight as it has now grown into a large commercial operation. After two inspections, it has declined to oversee the Kalama Bakery for a third because of this growth. Washington's Cottage Food Industry state workers can be reached at 360-902-1876.

The Ahrens are now suing Ms. Carmichel for more truck access to the back of their lot. Cowlitz County Superior Court Civil Division Case# 15-2-00896-1. The law suit incredulously asks for the right to travel over her land so that the bakery can get more delivery trucks to and from their house. A decision by the city indicating the bakery is improperly located would appear to have no impact on the litigation. The dispute between the parties is for access to land via adverse possession and/or related land laws.

This now constitutes a more thorough compilation of Ms. Carmichel's grievances regarding the operation of the commercial bakery in her residential single family neighborhood. The business violates every local code on file. It must cease operations immediately and the city must send notice to the Ahrens to commence this shutdown. If you do not agree that this bakery is illegally operating, please respond by identifying the facts and/or law you may be relying upon to make that determination.

Respectfully,
Stephen I. Liss, Esq.
WSBA #44611

Here is Mr. Brachvogel's September 4, 2015 response which clearly indicates his office needed to reconsider.

Dear Mr. Liss:

The City appreciates the opportunity to revisit the issue of whether the Ahrens are in violation of the R-1 permitted uses.

My client has reviewed your request to reconsider your client's allegation that Mr. Ahrens is operating a bakery in violation of R-1 permitted uses, but concludes the Ahrens are operating lawfully within the code. The code authorizes cottage industries, which is defined as: Under KMC17.08.1088 "Cottage industry" means a business located on the same lot as the operator's residence which functions without altering the residential character of the neighborhood, and which does not create negative impacts on the public health, safety, and general welfare of adjacent property owners." My client does not find that the cottage industry "alters the residential character of the neighborhood" nor does it objectively create a "negative impact on the general welfare of adjacent property owners." We have been informed by the Ahrens' counsel that deliveries are made once per day, four days a week, during business hours, which cannot reasonably alter the neighborhood to the extent such use violates the code. Likewise, there are no retail sales taking place at the Ahrens residence such that an unreasonable amount of traffic is created by the business location.

The WAC you cite pertains to licensure and regulation by the State Department of Health, not the City of Kalama. Assuming *arguendo*, the WAC is applicable here the City is not persuaded that the Ahrens exceed the allowable uses of R-1 zone by virtue of using eggs in the making dough for baking. To the contrary, the WAC 16-149-120 "Allowable cottage food products" specifically names baking as a cottage industry authorized under DOH regulations.

As to your request for appellate remedies, I have suggested you review the Kalama City code, a copy of which may be obtained on line through the City of Kalama website. However, I decline to advise you further given the Carmichels have an active matter before the Cowlitz County Superior Court in which they make the same allegations as made in this instance; and, they are represented by you in this cause of action.

Sincerely,
Paul Brachvogel
Kalama City Attorney
(360) 721-0027

Mr. Brachvogel now asserts his final decision was rendered back in mid-August and Ms. Carmichel should be barred from appearing before council. Ms. Carmichel disagrees and pursuant to local code 17.12.050 asks this council to allow her to appeal the city's final Sept. 4th ruling.

Not until Sept. 4th did Mr. Brachvogel cite any city code or state law based on any facts related to the complaint which allowed the bakery to operate in an R-1 zoned neighborhood. Primarily because there is no such statute; to the contrary, your city zoning law specifically forbids the operation bakeries. (See Kalama Muni Code 17.60.020 at https://www.municode.com/library/wa/kalama/codes/code_of_ordinances?nodeId=TIT17ZO_CH17.60USTA) which Mr. Brachvogel asked me to provide for him. Mr. Ahrens, the owner of the residential property, admits he operates a bakery out of the home (See email attachments of news article and Facebook comments). As such the bakery is clearly not permitted and should be closed.

Additionally, even if this Council was to ignore its own zoning law, which it should not, the state law which authorizes certain types of businesses to operate out of residentially zoned communities must do so without altering the residential character of the neighborhood, and "which does not create negative impacts on the public health, safety, and general welfare of adjacent property owners." Mr. Brachvogel believes there is minimal traffic during regular business hours. Truck and employee traffic from the bakery starts around 3 a.m. and ends mid-morning, Ms. Carmichel can testify. This is certainly not the residential character Kalama City leaders envisioned when they enacted the zoning ordinance prohibiting bakeries (not just retail but ALL bakeries and food processors) from operating in R-1 neighborhoods.

As for having a negative impact on the general welfare of adjacent property owners, the Ahrens illegally dumped gravel on part of a city street to create better access to the rear of their lot. The trucks that travel to and from the lot kick up significant amounts of dust and debris which now coats Ms. Carmichel's house and property. A retaining wall is damaged from the trucks which clipped her property when they made sharp turns onto Juniper Street. She must keep her

windows shut near her kitchen and bedrooms to prevent the dust and heavy early morning noises from disturbing and impacting her more than they already are.

Also, the state administrators who enforce Washington's cottage industries have determined already that the bakery is NOT a cottage industry and does NOT fall under their jurisdiction. Washington's Cottage Food Industry state workers can be reached at 360-902-1876 and will state on the record that the Ahrens' business is a commercial bakery not a "cottage industry" as contemplated under state law.

In summation, please allow this letter and attachments to serve as Ms. Carmichel's formal appeal of the city's denial of her due process rights to be heard by this council after filing a proper appeal of a disputed city ruling within 10 days of that ruling. She urges this City Council to overturn the administrative decision so it can get on to the merits of whether or not the bakery is properly operating within this residential neighborhood. This bakery is a fine asset to this community. However, it belongs in an appropriately zoned neighborhood, not one that is R-1 zoned. Ms. Carmichel and I will plan to attend any and all Council sessions of which we are permitted to attend so that her testimony and legal arguments are fully available for Council's review. If required, I will continue to supplement this appeal letter with any and all information which may be needed or requested for your determination.

Respectfully,
Stephen I. Liss, Esq.
WSBA#44611

Cc: Katharine Carmichel, Paul Brochvogel